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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

417

No. 417

BAXTER GRIFFIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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FRANCIS J. KELLY,
J. LOUIS O'CONNOR,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Statement of the case	2
Specification of assigned errors	5
Summary of argument	5
Argument	6
I. If the evidence is actually "newly discovered" and admissible it is not for the court to determine what its effect on the jury would have been, but it is a matter for a jury	6
II. A prosecuting attorney, especially in a first-degree murder case where a death sentence is mandatory on conviction, has the duty of bringing every fact at his disposal to the attention of the jury or to the attention of defense counsel. This includes not only facts indicative of defendant's guilt, but also any fact which might possibly be in defendant's favor or in his favor as to the degree of culpability with which he is charged	11
III. If the newly discovered evidence is such that reasonably prudent jurymen might differ as to whether or not it would raise a reasonable doubt as to the guilt of a defendant charged with first-degree murder, a new trial should be granted	13
Conclusion	16

Table of Cases Cited

Arbuckle v. *United States*, 79 App. D. C. 282, 146 F. 2d 657	10
Berger v. *United States*, 295 U. S. 78	12
Cleary v. *United States*, 163 F. 2d 748	8

Evans v. United States, 122 F. 2d 461
Griffin v. United States, 164 F. 2d 903
Helwig v. United States, 162 F. 2d 837
Hicks v. Commonwealth, 136 Va. 728, 117 S. E. 843, 35 A.L.R. 431
Johnson v. United States, 32 F. 2d 127
Jordan v. United States, 114 F. 2d 599
Long v. United States, 139 F. 2d 652
People v. Swetland, 77 Mich. 53
People v. Vick, 235 Mich. 475
Prisament v. United States, 96 U. S. 865
Wagner v. United States, 118 F. 2d 801
Weiss v. United States, 122 F. 2d 675.

STATUTE CITED

Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, c. 229, para. 1, 43 Stat. 938 (U.S.C., Title 28, para. 347-a)

SUPREME COURT OF THE UNITED STATES

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No. 417

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THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit dismissing the appeal from the District Court of the United States for the District of Columbia was rendered in a per curiam decision and is not reported (R. 134). The opinion of District Judge Holtzoff denying petitioner's motion for a new trial on the ground of newly discovered evidence is contained in the Record at Pages 115 to 116.

Jurisdiction

The judgment of the circuit court of appeals dismissing petitioner's appeal from the order of the District Court was entered June 16, 1948 (R. 134). The petition for a

writ of certiorari was filed July 8, 1948. An order allowing certiorari was entered November 15, 1948 (R. 136). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, para. 1, 43 Stat. 938 (U. S. C., Title 28, para. 347 a).

Statement of the Case

On March 3, 1947 petitioner was found guilty by a jury in the United States District Court for the District of Columbia of the crime of first degree murder. On April 18, 1947 a motion for a new trial was overruled and petitioner was sentenced to death. On December 8, 1947 the judgment of the lower court was affirmed by the United States Court of Appeals for the District of Columbia Circuit (*Griffin* v. *United States*, 164 F. 2d 903). This Court denied certiorari on March 15, 1948 (333 U. S. 857). Thereafter, on May 7, 1948 petitioner filed a motion for a new trial on the ground of newly discovered evidence which, after hearing, was denied by the District Court on May 25, 1948. The appeal from the denial of this motion was dismissed on motion of the United States on June 16, 1948. On November 15, 1948 this Court granted a petition for a writ of certiorari.

Petitioner's discussion of the case will be confined strictly to the matters brought to light on the hearing on the motion for a new trial except where it is necessary to state what happened at the original trial in support of his argument that a new trial should be granted.

The proceedings in the original trial deemed pertinent to the issue now before this Court may best be set out by quoting from the opinion of the United States Court of Appeals for the District of Columbia Circuit in the case of *Griffin* v. *United States* (164 F. 2d 903):

> "The testimony of all the witnesses, including appellant, was that a number of persons, among whom were

included appellant and the deceased, one Lee Hunter, had gathered in the apartment of one Lurline Bost at 1718 8th Street, Northwest, Washington, D. C., during the afternoon of February 8, 1947. Some of those present, including appellant and the deceased, were engaged in a gambling game called "blackjack," and there was considerable drinking of whiskey and beer. Five witnesses testified that the blackjack game had ended and that appellant began to play with Hunter's baby, that Hunter objected to appellant playing with the baby on the ground that he had been drinking, that appellant said, "If you don't want me to play with your baby, I will take your wife and baby around to my house," and that Hunter responded that if he did, he (Hunter) would kick his teeth down his throat. These five witnesses testified that appellant then withdrew from the apartment but returned in about ten or fifteen minutes with a pistol and immediately opened fire, killing Hunter with the first shot and firing three more shots in the general direction of other members of the party without hitting anyone. The testimony was that during the firing he said: "Ain't nobody going to say they are going to kick my teeth down my throat and get away with it." Afterwards he retreated to the hallway, fired two more shots through the door, and then ran out of the house.

Appellant took the stand in his own behalf. His version was that the blackjack game was still in progress, that he was banking it, that there were eight dollars in the pot, that Hunter won a dollar and demanded the whole pot, to which he objected. Hunter advanced upon him with the threat to kick his teeth down his throat. Also, that Hunter had his hand in his pocket and that appellant thereupon, being fortuitously in possession of a gun, shot and killed Hunter in self-defense. On cross-examination, appellant added the testimony that Hunter had threatened to kill him."

It will be noted from a reading of the foregoing statement hat appellant testified that the shooting occurred in self

defense when deceased advanced upon appellant after demanding all the money in the pot. It is thus clearly apparent that whether or not the card game had ended as the Government witnesses testified or was still in progress as petitioner testified, was an issue vitally important to the defense. At the original trial there was no testimony with respect to the presence of playing cards. Subsequently, however, at the hearing on the motion for a new trial, testimony was adduced from various police officers which proved that the deceased had in his right hand (which right hand was in his right hand trousers pocket) some playing cards (R. 82, 92, 93, 94, 95, 96, 97, 100, 101, 107, 108, 111, 112). The testimony as to the *number* of playing cards which deceased was grasping varied with each of the witnesses who testified at the hearing and ran from a "few" cards to a deck of cards.

Furthermore, at the hearing on the motion for a new trial various police officers and a morgue attendant testified that there was in the right hand trousers pocket of deceased an open bladed knife, and that at the time deceased was examined (immediately after the shooting and death) he had his right hand in his right hand trousers pocket, and that this fact had been brought to the attention of the Assistant United States Attorney (R. 82, 88, 96, 97, 99, 108). At the same hearing the Assistant United States Attorney who had prosecuted the case made the following statement:

> "I would like to state that the prosecution did know there was an open knife in the pocket of the deceased, but I took the position that there was no evidence in the case that this knife was ever taken (by the deceased) from his pocket. Even by the defendant's own testimony, he testified the deceased came around the table toward him with his hand in his pocket. The defense put in evidence the photograph which * * * showed this deceased with his hand in his pocket.

I felt, just as Your Honor pointed out a while ago, if this fact of the knife had been raised it would not have been admissible. The man could have had a dozen knives in his pocket and unless it was shown that the defendant saw this knife or he was drawing out a knife or had a knife in his hand, that it would not have been admissible. That is the position I took. Certainly it was with no intention of suppressing any evidence which I felt was admissible." (R. 84, 85.)

Specification of Assigned Errors

(1) The lower courts erred in denying appellant's motion for a new trial on the ground of newly discovered evidence. For purposes of clarity this specification will be subdivided into

(a) The newly discovered evidence concerning the presence of an opened knife in the right hand pocket of deceased, and

(b) The presence of some playing cards in the right hand pocket of the deceased.

Summary of Argument

(1) If the evidence is actually "newly discovered" and admissible it is not for the Court to determine what its effect on the jury would have been, but it is a matter for a jury.

(2) A prosecuting attorney, especially in a first-degree murder case where a death sentence is mandatory on conviction, has the duty of bringing every fact at his disposal to the attention of the jury or to the attention of defense counsel. This includes not only facts indicative of defendant's guilt, but also any fact which might *possibly* be in defendant's favor or in his favor as to the degre of culpability with which he is charged.

(3). If the newly discovered evidence is such that reasonably prudent jurymen might differ as to whether or not it would raise a reasonable doubt as to the guilt of a defendant charged with first degree murder, a new trial should be granted.

ARGUMENT

I

If the evidence is actually "Newly Discovered" and admissible it is not for the Court to determine what its effect on the jury would have been, but it is a matter for a jury.

District Judge Holtzoff in overruling appellant's motion for a new trial in his oral opinion stated:

> "It now appears that it is made the basis for this application that the deceased had an open pocket knife in his pocket at the time he made the menacing gesture. It does not appear, however, that he had withdrawn the knife from his pocket and it does not appear that the defendant knew that the deceased carried an open pocket knife at the time. Moreover, the open pocket knife was not in the hand of the deceased, when the hand of the deceased was taken from his pocket. A number of playing cards was found in it and further search revealed the knife in his pocket, apparently lying loose.
>
> The Court is unable to perceive that the presence of an open pocket knife in the pocket of the deceased has any bearing on the issues of this case." (R. 115.).

Although as previously stated, the United States Court of Appeals for the District of Columbia Circuit rendered no opinion in dismissing the appeal from Judge Holtzoff's denial of the motion, that Court did render a written opinion in Case No. 9904 in granting the Government's motion to

dismiss an appeal from an order denying a petition for a writ of *habeas corpus*. In that opinion the Court stated:

> "The present petition refers to the record of a recent hearing on a motion for a new trial on the ground of newly discovered evidence, which record was before this court on appeal in No. 9882, *Griffin v. United States*. That record shows that Hunter had, and the prosecutor knew he had, an open knife in his pocket but *not* in his hand. It shows that Hunter's hand was clasped around playing cards, so firmly that they stayed in his hand when it was removed from his pocket after his death. If the knife had been in his hand, as the petition says it was; or even if his hand had been empty, so that an inference might have been drawn that he was reaching for the knife; its presence would have given substantial support to appellant's story that Hunter threatened him. But since Hunter was neither holding nor reaching for the knife and, on the contrary, was firmly clutching playing cards, the fact that an open knife was readily available to him is strong evidence that he had no intention or thought of making a violent attack upon appellant. It therefore gives no support to appellant's contention that Hunter threatened him or appeared to do so. It even tends, in some degree, to refute that contention. Plainly, therefore, the prosecutor's course in not using the evidence of the open knife, while it may have been unwise, did not detract from the fairness of appellant's trial and is irrelevant in this proceeding."

It is submitted that, with all respect to the courts below, both courts have committed the judicial error of attempting to invade the province of the jury.

Both courts stress that the knife was not in the hand of the deceased when he was shot. There was no proof of this—the only proof is that *after* he was shot an examination showed his right hand to be clasping some playing cards in his pocket. Are judges, without the aid of medical testimony, to be permitted to speculate on the convulsive

effect of a gunshot wound? Maybe the knife *was* in deceased's hand at the time he was shot, but *after* the shot he convulsively released the knife and grabbed the cards. Certainly had the presence of the knife been made known to appellant's counsel at the time of trial, such an argument would not have been too far fetched to make to a jury. And what judge can say that such an argument might not have created a reasonable doubt in the mind of at least one juror, or what judge can say that the jury might not have returned a verdict of second-degree murder or perhaps manslaughter?

The Court's attention is directed to the case of *Cleary* v. *United States*, (163 F. 2d, 748 Ninth Cir.). This was an appeal from an order of the District Court denying a motion for a new trial on the ground of newly discovered evidence. The affidavits in support of the motion tended to show an alibi. The District Court denied the motion saying that "it appears the jury at the time of trial believed the competent testimony of the victim of defendant's alleged crime and did not believe defendant's story on the witness stand, and because the Court knows of no reason why a new jury at a second trial would not do the same thing as the first jury did.". The Circuit Court of Appeals, however, stated "It is obvious that if the evidence, so claimed to show the alibi, were actually newly discovered, it was a matter for the jury and not for the judge to consider its weight against the testimony of the complaining witness." (The Court affirmed the denial of the motion because it found that the evidence was not "newly discovered".)

In *Helwig* v. *United States* (162 F. 2d 837) the Petitioner was convicted of a violation of the Mann Act. A motion for a new trial on the ground of newly discovered evidence was filed and denied. The newly discovered evidence consisted of affidavits from two persons in Ohio who would

testify that Petitioner and prosecutrix had stated that the purpose in going from Ohio to Pennsylvania was to be married. The United States Court of Appeals, Sixth Circuit, stated

(1) That it did not appear that this evidence was "newly discovered" because it was available to Petitioner at the time of trial, but

(2) Since these persons were not called the verdict and sentence should be set aside and the case remanded for a new trial. The Court said:

> "It would seem to be clear, however, that this evidence, if it had been produced, would have had a material bearing upon the issue as to whether the interstate transportation had a dominant legitimate purpose. Of course, the jury might still have found that the transportation of the girl was for one of the condemned purposes, in view of all the circumstances including the previous relations of the parties, their subsequent conduct and the return of the girl to Ohio without any effort to accomplish a valid marriage. We are, of course, unable to say that the Jury would so have found, even though an intent to pursue sexual relations prior to marriage may still be in pursuit of an immoral purpose according to prevailing mores."

The Government in its Memorandum in opposition to the granting of the petition for certiorari cited numerous cases in support of its contention that a new trial, on the basis of newly discovered evidence, will be granted only if the evidence, among other things, is of such a nature that it would probably result in a verdict of acquittal. (Citing *Long* v. *U. S.*, 139 F. 2d 652; *Weiss* v. *U. S.*, 122 F. 2d 675; *Evans* v. *U. S.*, 122 F. 2d 461; *Wagner* v. *U. S.*, 118 F. 2d 801; *Prisament* v. *U. S.*, 96 U. S. 865 and *Johnson* v. *U. S.*, 32 F. 2d 127). It is significant, however, that only one of these cases in-

volves first-degree murder and that in all the cases the affidavits concerning newly discovered evidence were traversed by the Government. In the first-degree murder case (*Evans* v. *United States*) the newly discovered evidence was not only palpably a fabrication but of such a nature as to attempt to prove that death *might* have resulted from a cause different than that testified to by medical experts at the trial. And the testimony of the medical experts had been convincing beyond reason. In the other cases relied upon by the Government the newly discovered evidence was either merely of an impeaching nature, or of such dubious truth that the Government denied the authenticity of the new evidence. *In the instant case the Government admits that the evidence is newly discovered and that the Government knew of the evidence at the time of trial but did not disclose it either to the Court or to defense counsel.*

In *Arbuckle* v. *United States* (79 App. D. C. 282; 146 F. 2d 657) the United States Court of Appeals for the District of Columbia Circuit ordered a new trial in an embezzlement case when appellant had been placed on probation. The new evidence was available to defense counsel at the time of trial, but because illness caused a lack of time in preparation for trial the Court of Appeals treated the evidence as "newly discovered." The new evidence would merely impeach the testimony of the prosecuting witness. Arbuckle was on probation when the new trial was granted—this appellant is awaiting execution.

The Court's attention is directed to the following excerpt from *Hines* v. *Commonwealth* (136 Va. 728; 117 S. E. 843; 35 A. L. R. 431). "In a criminal case, to obtain a new trial, such new evidence must be of such a character as, on being considered with all the rest of the testimony, to leave a reasonable doubt as to the defendant's guilt or at least as

to his guilt within the degree of culpability of which the jury found him guilty."

The Assistant United States Attorney in charge of the prosecution of this case stated that she felt that the fact of the open knife in the pocket of deceased would not have been admissible as her reason for not disclosing such fact to the Court or defense counsel. Petitioner alleges that such evidence would clearly have been admissible, and to exclude this fact would have been judicial error. Clearly the fact was relevant to the issue of whether petitioner shot in self-defense or not. (Wharton's "Criminal Evidence," 11th Ed., Vol. 1, pp. 440-447 incl.) But aside from that, petitioner alleges that it would have been admissible to prove the violent character of deceased. If the general character of the deceased in a homicide case where the defense is self-defense is admissible (which it clearly is—See 64 A. L. R. 1029), then his frame of mind on the specific occasion should certainly be admissible. Why would the deceased be carrying an *open* knife in his pocket other than to have it ready for immediate use as a weapon? Many persons carry knives—only persons with criminal intent carry *open* knives.

H

A prosecuting attorney, especially in a first-degree murder case where a death sentence is mandatory on conviction, has the duty of bringing every fact at his disposal to the attention of the jury or to the attention of defense counsel. This includes not only facts indicative of defendant's guilt, but also any fact which might possibly be in defendant's favor or in his favor as to the degree of culpability with which he is charged.

So much has been said and written in legal treatises, opinions of courts and public addresses concerning the duty of Prosecuting Attorneys, and this Court is so familiar with

their duties that the argument on this point will be limited. Justice Sutherland in *Berger* v. *United States* (295 U. S. 78) stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and a very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

And in an opinion by Justice Rutledge, then a member of the United States Court of Appeals for the District of Columbia, in the case of *Jordan* v. *United States* (114 Fed. 2d, 599) he said:

> "—the prosecutor not only is not allowed to suppress evidence vital to the accused, but is required in certain circumstances to disclose such evidence to him or to the court in order to avoid what would amount in practical effect to concealment."

The Supreme Court of Michigan in *People* v. *Vick* (235 Mich. 475) reaffirmed its previous position stated in *People* v. *Swetland* (77 Mich. 53) as follows:

> "It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so."

Petitioner's present counsel, far from charging that the Assistant United States Attorney acted in bad faith and actively suppressed material evidence, wish to state that her frank statement made at the hearing on the motion for a new trial that she knew of the presence of the open knife at the time of trial and her reasons for non-disclosure bespeak for her the utmost candor and honesty. But it is respectfully submitted that she was in error, and the result of her error is that a person has been convicted of first-degree murder who might otherwise not have been. Perhaps she was, and still is, completely convinced of the guilt of petitioner, but her duty was to convince the jury of such guilt beyond a reasonable doubt with a full disclosure of *all* the facts, and not merely to convince herself or the Trial Judge.

The issue in this appeal is not the guilt or innocence of the petitioner, but rather it is whether or not a full disclosure of the fact that deceased had "some" playing cards in his hand (indicating that the game had not ended as the Government witnesses testified), plus the fact that deceased had in his right-hand trousers pocket an *open* knife (indicative of his intent to have it ready for immediate use as a weapon) would have raised in the minds of the jury (or one single member thereof) a reasonable doubt as to his guilt in any degree or at least a reasonable doubt as to his guilt of murder in the first degree.

III

If the newly discovered evidence is such that reasonably prudent jurymen might differ as to whether or not it would raise a reasonable doubt as to the guilt of a defendant charged with first degree murder, a new trial should be granted.

At the trial of this case petitioner himself was the only witness for the defense. His version of the killing was in

direct contrast to that of the Government witnesses. The Government contended that the card game had ended, that an argument thereafter took place between petitioner and deceased, that deceased left the premises and returned in ten or fifteen minutes and shot deceased in cold blood. Petitioner's version was otherwise—he stated that the shooting occurred in self-defense when deceased advanced upon petitioner after trying to take all the money in the pot. Whether or not the game was in progress as petitioner contended or had been completed was a vital issue bearing on (1) the credibility of all witnesses, and (2) premeditation and deliberation. Would not the jury have been justified in finding that the game was still in progress had the jury known that deceased had some cards in his hand at the time he was shot? Judge Holtzoff in denying the motion for new trial stated:

> "The second basis for the motion is additional testimony tending to show that a number of playing cards were strewn on the floor of the room in which the shooting took place. Now witnesses produced in support of this contention were the same witnesses who testified at the trial, so there is nothing newly discovered in that respect. Moreover, that is a circumstance which does not appear to the Court to be of any substantial importance. The fact that a card game had taken place is not disputed. Whether it was still in progress or whether it had ceased is not very important, so far as the Court views the issues of this case. Moreover, the fact that there were cards on the floor would not necessarily establish that the game was still in progress." (R. 116).

Petitioner alleges this to be a glaring example of a court invading the province of the jury. Whether or not the game was in progress was of the utmost importance because the Government contended that the game was over,

and the petitioner testified that it was still in progress. If the jury had found that it was in progress they would have had to find that the Government witnesses were mistaken on this point, and possibly on others. Certainly the jury would have had to find that there was not a ten or fifteen minute period for deliberation, and probably would not have returned a verdict of first-degree murder. It is not for the Court to determine that whether or not the game was still in progress was unimportant. Perhaps it would make no difference to the Court—but it is for the jury to determine whether or not it was important. Apparently the matter assumed some importance in the mind of the Prosecuting Attorney because in her summation to the jury she stated:

> "The only question we are concerned with is did this occur at the time the card game was going on, or after it was over; or did the shooting occur in self-defense, or did it occur as alleged in the indictment, by premeditated and deliberate malice on the part of this defendant, * * * (T. 56).

The record indicates that the one photograph which should have portrayed some cards on the floor did not do so (R. 90) and defendant's counsel had no knowledge of it. So the evidence of the presence of cards in the pocket of the deceased was therefore newly discovered. This is a capital case, and *any* fact which would tend to lessen the degree of culpability should go to the jury for its deliberation. Certainly if reasonable men might differ as to the weight to be accorded this circumstance then that circumstance is a matter for the jury's determination.

This Court has stated on many occasions that it is better that one hundred guilty persons go free than that one innocent person be convicted. The argument now is not that petitioner is innocent, but that he should be granted a

new trial so that a jury may determine his guilt or innocence after reviewing all the evidence, including the presence of the open knife and the presence of the cards in decedent's hand. Both these facts were known to the Government and not to petitioner at the time of trial, and petitioner alleges that their non-disclosure is a violation of procedural due process.

This Court in recent years has decided many cases which tend to place around the accused even more safeguards than he formerly had. Petitioner alleges that, especially in a capital case, the proper administration of criminal justice demands that the Government make known to the jury *any* fact that could possibly cause a reasonable person to doubt the guilt of the accused. In the instant case there are two extremely important facts that not only could *possibly* affect the jury's decision but *in all probability* would have lessened the degree of petitioner's guilt.

Conclusion

For the reasons stated, judgment should be set aside and the case remanded with instructions to grant a new trial.

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